

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CAROL CHESEMORE, DANIEL DONKLE,
THOMAS GIECK, MARTIN ROBBINS and
NANNETTE STOFLET, on behalf of themselves,
individually, and on behalf of all others similarly
situated,

Plaintiffs,

v.

ORDER

09-cv-413-wmc

ALLIANCE HOLDINGS, INC., A.H.I., INC.,
AH TRANSITION CORP., DAVID B. FENKELL,
PAMELA KLUTE, JAMES MASTRANGELO, and
JEFFREY A. SEEFELDT,

Defendants,

and

TRACHTE BUILDING SYSTEMS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN
and ALLIANCE HOLDINGS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendants.

Defendants Alliance Holdings, Inc., A.H.I., Inc. and AH Transition Corp. (collectively "Alliance") moved this court on May 3, 2013, for leave to amend their answer to add contingent crossclaims for contribution and indemnification against defendant David B. Fenkell. (Dkt. #772.) Having reviewed the parties' briefs, the court will deny the motion.

First, the motion is woefully untimely under Fed. R. Civ. P. 16. Indeed, not only does it come almost four years after the filing of this lawsuit and more than three years after the original deadline to amend pleadings, but a year and a half after the liability trial, almost a

year after the trial on damages and now after the court has rendered its damages opinion. Alliance and Fenkell have been aligned in their defense of this matter throughout the litigation in this court. Indeed, until the last month, they were represented by the same legal counsel, having determined that this was in their collective best interest. Now, with judgment about to be entered, Alliance suddenly wishes to change its strategy, pointing fingers at defendant Fenkell. Too late.

Second, Alliance has offered no good cause for this court modifying its schedule for amendments at such a late date pursuant to Fed. R. Civ. P. 16(b)(4). Nor could they. If anything, such a last-minute change in strategy will unfairly prejudice plaintiffs, who are entitled to entry of judgment in this case without further delay. Moreover, the Alliance entities appear to be proceeding, along with the new trustee for the Alliance ESOP, in an action in the United States District Court for the Eastern District of Pennsylvania, where they are seeking indemnification and contribution rights from Fenkell. *Spear, et al. v. David Fenkell, et al.*, 13-cv-02391 (E.D.PA, filed May 1, 2013). Under the circumstances, neither judicial efficiency nor equity would support permitting an amendment.

Third, however forgiving Fed. R. Civ. P. 15 is generally intended to be with respect to the grant of amendments before trial “where justice so requires,” an amendment during trial must not do prejudice to the party opposing it, and an amendment after trial is generally permitted only when the issue has been “tried by the parties’ express or implied consent.” The latter is certainly lacking here. Moreover, Alliance has no reasonable argument that defendant Fenkell would not be prejudiced if this court now took up the crossclaims on this

record, which is lacking in evidence of decision-making internal to Alliance, part of which was arguably subject to attorney-client privilege.

While this court is sympathetic to the argument that there may be some efficiency in the same court taking up contribution and indemnification crossclaims, an efficiency argument is not persuasive (1) more than three years after the deadline established by this court to amend the pleadings; (2) after Alliance proceeded to trial on both liability and damages without attempting to assert any crossclaims against Fenkell; and (3) after Alliance failed to present or permit Fenkell to offer opposing evidence at trial with respect to any possible crossclaims between it and Fenkell. Having chosen to be represented by the same attorneys and to present no evidence or legal argument on this issue before or during trial, Alliance will now have to pursue these claims elsewhere.

For all these reasons, the motion will be denied.

ORDER

IT IS ORDERED that the Alliance defendants motion for leave to amend their answer to add contingent crossclaims for contribution and indemnification against defendant David B. Fenkell (dkt. #772) is DENIED.

Dated this 12th day of June, 2013.

BY THE COURT:

/s/

William M. Conley
District Judge